IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under and in terms of Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Sections 754 and 758 of the Civil Procedure Code.

SC CHC APPEAL 53/2006

1. Nihal Seneviratne,
   No. 22, Mile Post Avenue,
   Colombo 03.
2. Jeevana Priyantha Seneviratne,
   No. 11/1, Mahanuga Gardens,
   Colombo 03.

DEFENDANTS - APPELLANTS

-Vs-

State Bank of India,
No. 16, Sir Baron Jayatilaka Mawatha,
Colombo 01.

PLAINTIFF - RESPONDENT

BEFORE	**:**	Hon. S. Marsoof, P.C. J, Hon. K. Sripavan J, and Hon. E. Wanasundera P.C. J.
COUNSEL	**:**	S.P. Sriskantha with T. Sri Pathmanathan for the Defendants-Appellants Avindra Rodrigo with Ananda Tikitiratne and Ms. Raneesha de Alwis for the Plaintiff-Respondent
Argued On	**:**	5.11.2013
Decided On	**:**	17.12.2014

SALEEM MARSOOF, P.C. J,

This is an appeal filed in terms of Section 6 of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 against the judgment of the High Court of the Western Province exercising commercial jurisdiction (hereinafter referred to as the "Commercial High Court") holden in Colombo dated 19th September 2006. By the said judgment, the Commercial High Court has granted the relief sought by the Plaintiff-Respondent Bank (hereinafter referred to as "the Respondent") as prayed for in prayers (a) and (b) of the Plaint, to wit judgment against the first and second Defendants-Appellants (hereinafter referred to as "the Appellants") in the sum of Rs. 22,448,573.62 together with interest thereon at the rate of 27% per annum from the 1st of January 2002 to the date of the decree and thereafter on the aggregate sum of the decree at the same rate until the date of payment in full, and costs.

The Appellants have appealed against the judgment of the Commercial High Court on several grounds which shall be adverted to later in this judgment, and have submitted that the Commercial High Court

has grossly erred in granting relief to the Respondent. Learned Counsel for the Appellant has submitted that the Commercial High Court should have dismissed the action and learned Counsel for the Respondent has made submissions to the contrary.

Before adverting to these submissions and examining them in detail, it might be useful to summarise the factual background.

The factual matrix

The Appellants are Directors of Nihal Brothers Marketing (Pvt.) Ltd (hereinafter referred to as "the company"), which is a company incorporated in Sri Lanka which carries on business as a trader and importer of various items of goods. In consideration of the financial and banking facilities granted to the said company by the Respondent in connection with certain imports of sugar, the Appellants executed a Guarantee Bond dated 23rd September 1997, marked P9. The said financial and banking facilities granted by the Respondent to the said company included what is known as a "trust receipt facility" which provided an additional form of security for financial advances made by the Respondent to enable the said company to pay for and clear certain consignments of sugar against trust receipts issued by the company.

Between the period 23rd June 2000 to 18th September 2000, the said company obtained certain advances of money against 4 Trust Receipts to the value of Rs. 17,221,000/-. Details concerning the said Trust Receipts are as follows:-

TR 2000/48: Rs. 3,621,000 Date: 23rd June 2000
TR 2000/52: Rs. 4,172,000 Date: 12th July 2000 (P2)
TR 2000/63: Rs. 4,646,000 Date: 6th September 2000 (P3)
TR 2000/68: Rs. 4,879,000 Date: 18th September 2000 (P4)

While the first of the four trust receipts was not marked in evidence, the next three receipts were marked respectively as P2, P3 and P4. The Respondent, by letter demand dated 25th January 2001 marked as P10, demanded that the company repay the sum of Rs. 17,221,000 which was lawfully due and owing to the Respondent as at 18th December 2000. The Respondent also demanded from each of the Appellants on the Guarantee Bond, the payment of the said sum of Rs. 17,221,000 by two letters, both dated 25th January 2001, marked respectively as P11 and P12.

Subsequent to this, the company further obtained loans by way of Trust Receipts marked as P5 and P6, the details of which are as follows:-

TR 2001/10: Rs. 2,198,000 Date: 20th February 2001 (P5)
TR 2001/12: Rs. 2,198,000 Date: 27th February 2001 (P6)

The sum claimed by the Respondents before the Commercial High Court was a sum of Rs. 22,448,573.62/-. This sum comprises of Rs. 17,036,000/- which reflects the aggregate of the principal sums allegedly granted to the company by way of Trust Receipts marked as P2, P3, P4, P5 and P6 and the interest charged on the principal sum of Rs. 17,036,000/-. From the proceedings before the Commercial High Court, it is evident that full repayment of Trust Receipt No. 2000/48 (which was not marked in evidence) and a partial payment of Rs. 1,057,000 in respect of Trust Receipt No. 2000/52 (P2) has been made, and these sums have been deducted from the sum which was claimed by the Respondent.

On 17th October 2001 by way of letter marked as P13, the company, through its Attorneys-at-law, replied the letters demand marked as P10 stating *inter alia* that the claim made by the Respondent was not just or equitable and therefore to desist from instituting any legal action in respect of such claim.

By Plaint dated 25th January 2002, the Respondents instituted action before the Commercial High Court against the Appellants without making the principal debtor, Nihal Brothers Marketing (Pvt.) Ltd, a defendant to the action. The Appellants filed answer and the case went to trial. At the conclusion of the trial, by its judgment dated 19th September 2006, the Commercial High Court pronounced judgment as prayed for by the Respondent. In the said judgment, the learned Judge of the Commercial High Court observed as follows:-

> "Since the evidence of Vijewadani Jesudasan has not been impeached, on a balance of probability, I am compelled to accept the evidence adduced through her which is quite consistent with the document marked in this case. The defendants have not proved that the Guarantee Bond marked P1 is bad in law. They have also failed to prove that the Attorneys-at-law failed to explain to them the meaning of and the effect of the clauses '*beneficium ordinis sue excussionis' and* '*beneficum divisionis'.*
>
> As regards the right of the Plaintiff to sue the Defendants since the Plaintiff has demanded the monies due from Nihal Brother Marketing (Pvt.) Ltd by document marked as P10, it is my considered view that the action against the two Defendants is maintainable."

Aggrieved by the said decision of the Commercial High Court, the Appellants have by their petition of appeal dated 16th November 2006 sought appellate relief on the following grounds:-

(a) The learned Judge had made a very serious misdirection and a fundamental error in not correctly considering the fundamental nature of the case;
(b) The learned Judge has filed to differentiate between personal transactions and commercial transactions;
(c) The learned Judge has gravely erred in fact and in law in that the commercial High Court was devoid of jurisdiction in hearing and determining this matter as the cause of action was based strictly on personal guarantees;
(d) The learned Judge had misinterpreted and has misdirection himself on the evidence placed before him;
(e) The learned Judge had erred in law in failing to address his mind altogether that in the absence of a claim and / or action against the principal debtor the claim against the secondary parties cannot be sustained.
(f) The learned Judge had erred in law in failing to address his mind altogether to the Written Submissions settled by the Counsel for the Defendants; and
(g) The learned Judge had gravely erred in failing to have addressed his mind to the fact that the sums claimed on the particular transaction had in fact been paid and settled by the principal debtor and, therefore no action could be maintained against the Defendants as guarantors.

At the hearing before this Court, learned Counsel for the Appellants confined his submissions to only four main grounds, which are that (i) the Commercial High Court lacked subject matter jurisdiction to entertain and decide the action instituted by the Respondent; (ii) the plaint did not disclose a cause

action in that the Appellants were sued on the basis of secondary liability as surety without first having recourse to the primary debtor, Nihal Brothers Marketing (Pvt) Ltd, which is not a party to these proceedings; (iii) the failure of the Commercial High Court to consider whether in the absence of a demand prior to the institution of action, there existed any cause of action against the Appellants to justify the award of relief to the Respondent on the Guarantee Bond on the basis of which action had been instituted; and (iv) the failure to establish, by evidence, the liability of the primary debtor, Nihal Brothers Marketing (Pvt.) Ltd, in order to sustain the claim on the said Guarantee Bond.

(i) The Question of Jurisdiction

The learned Counsel for the Appellants has contended that the Commercial High Court had no jurisdiction to entertain and give relief on the action filed in that court by the Respondent bank. He submitted that the subject matter jurisdiction of the Commercial High Court in the instant case is referable to section 2(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with the First Schedule thereto. In terms of section 2(1) of the said Act the High Court for the Western Province holden in Colombo has exclusive jurisdiction to "have cognizance of and full power to hear and determine in the manner provided for by written law, all actions, applications and proceedings specified in the First Schedule to this Act". The First Schedule referred to above (as amended) is as follows:-

FIRST SCHEDULE

(1) All actions where the cause of action has arisen out of *commercial transactions* (including causes of action relating to banking, the export and import of merchandise, services affreightment, insurance, mercantile agency, mercantile usage, and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding one million rupees or such other amount as may be fixed by the Minister from time to time, by Notification published in the *Gazette,* other than actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990.
(2) All applications and proceedings under sections 31, 51, 131, 210 and 211 of the Companies Act, No. 07 of 2007.
(3) All proceedings required to be taken under the Intellectual Property Act, No. 36 of 2003 in the High Court established under Article 154 P of the Constitution.

Learned counsel for the Appellants submits that the action was on a personal guarantee given by the appellants and is secondary to the transaction of loan between the Respondent Bank and Nihal Brothers Marketing (Pvt.) Ltd, the principal company. He stresses the personal nature of the guarantee and submits that by no stretch of imagination could it be deemed to be a commercial transaction. He relies on the decision in *Phillip v Commissioner of Inland Revenue,* 1 Sri Skantha's Law Reports 133 in which it was held that a director of a company is not personally liable in regard to the liabilities of a company.

Learned counsel for the Respondent has relied on the language used in section 2(1) of the High Court of the Provinces (Special Provinces) Act No. 10 of 1996 and the First Schedule thereto, which he submits includes the power to hear and determine any dispute arising from a "commercial transaction", including mercantile and/or banking documents. He also cited Black's Law Dictionary which defines a "commercial transaction" as '*any type of business or activity which is carried for profit*', and Webster's Third New International Dictionary which defines the term as *'to engage in conduct, practices or make use of for profit seeking purpose as distinguished from participation, practices or use for spiritual or*

recreational purposes or for other non-pecuniary satisfaction'. He also relied on the decision of the Court of Appeal in *Brunswick Exports Ltd v Hatton National Bank* [1999] 1 Sri LR 219 which related to a mortgage bond executed as security for a loan where it was held that:-

> "… 'the media' upon which the plaintiff has instituted action was a commercial transaction and therefore, action must necessarily stand removed to the High Court".

In the said case, the Court of Appeal was asked to determine whether an action on a Mortgage Bond would fall within the definition of a "commercial transaction", and it was the opinion of Weerasuriya J held that since the Mortgage Bond was entered in to in the course of normal banking business, the it fell within the definition of a 'Banking document'.

The phrase "commercial transaction", as found in the First Schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 was considered by this Court in *Cornell and Company Limited v Mitsui and Company Limited* [2000] 1 Sri LR 57, wherein this Court took the view the jurisdiction of the Commercial High Court should be construed widely. In this connection, it may be useful to refer to the decision of the Supreme Court of India in *R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co. and Another* [1994]1 SCR 837. In that case the Court was called upon to consider the provisions of Foreign Awards (Recognition and Enforcement) Act, 1961, in the context of which the question arose as to whether there was a *commercial* relationship between the parties as defined in Section 2 of the said Act and whether the Act would apply. In that case, an Indian Company entered into an agreement with a Company registered in USA. The Indian Company agreed to provide Boeing with consultancy services for sale of Boeing Aircraft in India. An agreement for the purchase of two Boeing Aircrafts was executed. A dispute arose and the appellant claimed compensation and remuneration for consultancy services. In view of arbitration clause, the matter was referred to arbitrator. It was contended by the foreign Company that there was no `*commercial* element' and hence the application was liable to be dismissed. This Court, however, rejected the contention, and held that the agreement to render consultancy service by the appellant to the respondent was *commercial* in nature and there was a commercial relationship between the parties. Referring to earlier cases, Court stated:-

> "It is not disputed that the sale of aircraft by Boeing to customers in India was to be a commercial transaction. The question is whether rendering of consultancy services by RMI for promoting such *commercial transaction* as consultant under the Agreement is not a "*commercial transaction*". We are of the view that the High Court was right in holding that the agreement to render consultancy services by RMI to Boeing is commercial in nature and that RMI and Boeing do stand in commercial relationship with each other. While construing the expression "*commercial*" in Section 2 of the Act it has to be borne in mind that the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction."

The above passage was cited with approval in the more recent decision of the Indian Supreme Court in *Comed Chemicals Ltd., v C.N Ramchand* AIR 2009 SC 494.

In the light of these decisions, it is clear that the expression "commercial" should therefore, be construed broadly having regard to the manifold activities which are integral to banking and commerce. In those circumstances, there is no doubt that the Commercial High Court did not err in assuming and exercising jurisdiction in this case.

(ii) Failure to Disclose a Cause of Action

It has been contended on behalf of the Appellants that the plaint did not disclose a cause action in that the Appellants were sued on the basis of secondary liability as surety without first having recourse to the primary debtor, Nihal Brothers Marketing (Pvt) Ltd, which is not a party to these proceedings.

Learned Counsel for the Appellants has strenuously submitted that a guarantor, to whom no money has been lent, cannot be held liable for a debt when no steps have been taken to recover such money from the principal debtor. He has relied on De Coylar's *Law of Guarantee* which, citing Pothier on Contracts, states at page 210:-

> "As the obligation of sureties is, according to our definition, an obligation accessory to that of a principal debtor, it follows that it is of the essence of the obligation that there should be a valid obligation of a principal debtor; consequently if the principal is not obliged, neither is the surety, as there can be no accessory without a principal obligation according to the rule of law".

Learned Counsel for the Respondents has argued that, in terms of clause 22 of the Guarantee bond, the Respondent Bank was at liberty to file action against both the borrower (the company) or the Appellants, or the Appellants jointly or severally for the sum remaining due upon loans granted to the company.

Clause 22 of the Guarantee Bond signed by the Appellants states as follows:-

> "22. I/we specifically agree that you shall be at liberty either in one action to sue the borrower and me/us or each or any of us and also any other person or persons all jointly and severally or to proceed in the first instance against me/us or each or any of us only and further that *I/we hereby renounce the right to claim that the Borrower should be excused or proceeded against by action in the first instance and the right to claim that you should divide your claim* and bring actions against me/us or each or any of us or any other person or persons whosoever each for his portion *pro rata* and the right to claim in any action brought against me/us or each or any of us without all or any other persons that you should only recover from me/us or each or any of us a pro rata share of the amount claimed and all other rights and benefits to which sureties are or may be by law entitled IT BEING AGREED that I am/we are liable in all respects hereunder as principal debtor/debtors to the extent aforementioned including the liability to be sued before recourse is had against the Borrower." *(emphasis added)*

For the avoidance of doubt, I note that within the Guarantee Bond, the term Borrower refers to the company. The Guarantee Bond was signed by the Appellants in their personal capacity.

Further, the final page of the Guarantee Bond states as follows:-

"The benefits and privileges of sureties referred to in the within written guarantee are as follows:

1) The *beneficium ordinis sue excussionis* is the privilege whereby a surety is entitled to claim that as his liability may be regarded to be of an accessory character it shall not be enforced against him until the creditor has unsuccessfully endeavoured to obtain satisfaction from the principal debtor.

2) The *beneficum divisionis* is the privilege whereby when several persons are sureties for a debt each of them may when sued for the whole amount require the creditor to divide the claim and bring his action in so far as the other are not insolvent.

By the renunciation of the above rights and all other privileges to which a surety is by law entitled the creditor is entitled to treat the surety as a Principal for all purposes.

I/we have read the above explanation of the rights of a surety and have understood the effect of my/our renouncing these privileges and of all other privileges to which I/we am/are entitled." (*emphasis added)*

The Appellants have waived the privileges usually available to sureties under the common law. It is clear from the Bond that the renunciation of the privileges of sureties has been read over and explained to the Appellants. In these circumstances, the submissions of the learned Counsel for the Appellants are devoid of merit.

(iii) Absence of Demand based on each Trust Receipt

Learned Counsel for the Appellants has submitted that the Commercial High Court erred in failing to consider whether in the absence of a demand prior to the institution of action, a cause of action could arise against the Appellants on the Guarantee Bond on the basis of which action had been instituted.

Learned Counsel for the Appellants has submitted that the letters demand sent to Nihal Brothers Marketing (Pvt.) Ltd marked P10 and similar letters demand sent to the 1st and 2nd Appellants marked respectively P11 and P12, all of which are dated 25th January 2001, only dealt with four Trust Receipts namely P2, P3, P4 and TR 2000/48 (not marked in evidence as the sum due on this Trust Receipt has been paid in full). Neither in evidence, nor in the plaint filed before the Commercial High Court has the Respondent established that it has sent either Nihal Brothers Marketing (Pvt.) Ltd or the Appellants letters demand in respect of P5 and P6, which related to Trust Receipts issued to the said company after the letters demand marked P10, P11 and P12 were dispatched.

At Clause 1 of the Guarantee Bond, the Appellants promised and undertook:-

"To pay to you in Colombo *on demand* all and every the sums and the sum of money which may now be or which shall at any time and from time to time be or become due or owing and remain unpaid to you anywhere by the Borrower upon or in respect of any current or loan or other account whether resulting from any Overdraft or Advance or from Bills of Exchange or Promissory Notes being purchased discounted or negotiated or from any Trust Receipt of any nature whatsoever executed by the Borrower and under which any money becomes due to you by the Borrower or from credits being made to or opened by or for the accommodation or at the request of the Borrower or from any other debt or liability (including obligations current though not then sue and payable) or other demands legal or equitable which may have against the Borrower or which the law of set off or debit and credit of mutual accounts would in any case admit or from any transaction of any kind whatsoever between the Borrower and you including every renewal or extension of any of the foregoing kinds of transactions whether any such renewal or extension be made or effected with or without the consent of or notice to me/us or each or any of us together with discounts banker's charges and expenses of every description all in accordance with your usual course of business and interest at such time or rates as may be fixed or charged by the Bank from time to time and all legal and other charges and expenses

whether taxable or not occasioned by or incidental to all or any of the foregoing or by or to the enforcement of this or any other security for the same on the recovery thereof." *(emphasis added)*

I find there is merit in the submissions of the learned Counsel for the Appellants to the extent that it is trite law that no cause of action could arise in terms of clause 1 of the Guarantee Bond with respect to any claim where no demand has been made. There is no evidence that a demand had been sent with respect to Trust Receipts bearing Nos. TR 2001/10 dated 20th February 2001 (P5) and TR 2001/12 dated 27th February 2001 (P6). It is also necessary to note that although the letters demand marked P10, P11 and P12 also includes TR 2000/48, there is clear evidence that the amount due on such Trust Receipt has admittedly been paid. It is also admitted that there has been a partial payment of Rs. 1,057,000 which was due in respect of TR 2000/52 (P2). Accordingly, the principal amounts due is an aggregate of Rs. 12,640,000. The computation of this sum is as follows:-

TR 2000/52 dated 12th July 2000 (P2):	Rs. 3,115,000 (Rs. 4,172,000- Rs. 1,057,000)
TR 2000/63 dated 6th September 2000 (P3):	Rs. 4,646,000
TR 2000/68 dated 18th September 2000 (P4):	Rs. 4,879,000
Total amount due:	Rs. 12,640,000

Accordingly, subject to what will be said under the following section of this judgment, entitled "Failure to Establish the Liability of the Primary Debtor, Nihal Brothers Marketing (Pvt.) Ltd", the aggregate principal sum, established by evidence at the trial, was only Rs. 12,640,000.

(iv)The Failure to Establish the Liability of the Primary Debtor, Nihal Brothers Marketing (Pvt.) Ltd

Learned Counsel for the Appellants has submitted that the Respondent Bank has failed to establish, by evidence, the liability of the primary debtor, Nihal Brothers Marketing (Pvt.) Ltd, which, it has been submitted, is necessary to sustain the claim on the said Guarantee Bond, against the Appellants. However, it is evident that the Appellants have produced several documents marked D3 to D32 and D35 to D39, which were counter foils of deposit slips issued by the Respondent Bank to the said company. Based on these documents, the learned Counsel for the Appellants argued that there was no sum outstanding to be repaid to the Respondent by the principal company, and therefore the issue of secondary liability on the guarantee bond does not arise.

Learned Counsel for the Respondent titles this as a "new defence", as this issue was not taken up on behalf of the company and the Appellants by letter dated 17th October 2001 (P13) sent by Messrs. Abdeen Associates, which was written in response to the letters demand dated 25th January 2001 marked P10, P11 and P12, issued by Messrs. F.J. & G. De Saram on behalf the Respondent. There was also no issue raised on this regard at the commencement of the trial.

Furthermore, learned Counsel for the Respondent relied on the document marked P17, which was a bank statement pertaining to Nihal Brothers Marketing (Pvt.) Ltd, and items therein marked P17a to P17x to establish that the deposits made by the said company and the Appellants, as evidenced by D3 to D32 and D35 to D39 were in respect of other Trust Receipts and transactions which do not come within the purview of this action and which are totally irrelevant to the Trust Receipts marked P2 to P4.

In these circumstances, I am of the opinion that the liability of the principal company, Nihal Brothers Marketing (Pvt.) Ltd, to the extent set out in the penultimate and final paragraphs of section (iii) of this judgment, which add up to an aggregate sum of Rs. 12,640,000 has been established by evidence.

Conclusion

It appears from the impugned judgment of the Commercial High Court dated 19th September 2006, that the principal amount with respect to which relief was granted by that Court was Rs. 17,036,000, which when interest and other dues were added, aggregated to Rs. 22,448,573.62. In view of the finding in section (iii) of this judgment headed "Absence of Demand based on each Trust receipt" that the principal sum due is only Rs. 12,640,000, it appears that the Commercial High Court has allowed a sum of Rs. 4,396,000 in excess of the amount due as principal.

In these circumstances, I am of the opinion that the judgment of the Commercial High Court should be varied by reducing from the aggregate sum of Rs. 22,448,573.92 awarded to the Respondent by the Commercial High Court inclusive of interest, the aggregate sum of Rs. 4,396,000, which amount I find the Appellants are not liable to pay to the Respondent. I would accordingly affirm the judgment of the Commercial High Court subject to the variation that the principal sum due with interest, as on the date of the judgment of the Commercial High Court dated 19th September 2006, was only Rs. 18,052,573.62.

The appeal is allowed, and the impugned judgment of the Commercial High Court is varied as aforesaid. Accordingly, I enter judgment against the Appellants, in the sum of Rs. 18,052,573.62, together with interest thereon at the rate of 27% per annum, from the date of the judgment of the Commercial High Court, namely 19th September 2006, to the date hereof, and on the aggregate sum thereof, further legal interest from the date hereof until payment in full.

In all the circumstances of this case, I do not award any costs.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, J.

I agree.

JUDGE OF THE SUPREME COURT

E. WANASUNDERA, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT